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State of New Jersey

DIVISION OF THE RATEPAYER ADVOCATE

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Governor

BLOSSOM A. PERETZ, ESQ.
Ratepayer Advocate
and Director

March 18, 1998

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VIA EXPRESS MAIL

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Petition for Expedited Declaratory Ruling

In the Matter of the
Federal State Joint Board
on Universal Service
Fourth Order on Reconsideration
Docket No. CC 96-45

TO THE HONORABLE COMMISSION:

Enclosed please find an original and eleven copies of the Petition for Expedited Declaratory Ruling submitted by the New Jersey Division of the Ratepayer Advocate to be filed with the Commission on the above referenced matter. Please time/date stamp the additional copy and return it to the undersigned in the enclosed stamped envelope.

Respectfully submitted,

Blossom A. Peretz, Esq.
Ratepayer Advocate

By: Lawanda R. Gilbert
Lawanda R. Gilbert, Esq.
Assistant Deputy Ratepayer Advocate

Encl.

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**Before the
Federal Telecommunications Commission
Washington, D.C.**

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PETITION FOR EXPEDITED DECLARATORY RULING

NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE
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March 18, 1998

EXECUTIVE STATEMENT

Pursuant to section 1.2 of the Federal Communication Commission's (FCC) rules, 47 CFR §1.2, the New Jersey Division of the Ratepayer Advocate (Ratepayer Advocate) hereby submits this Petition for Expedited Declaratory Ruling. This petition seeks a declaratory ruling from the FCC that: 1) certain discounted rates for services provided by Bell Atlantic-New Jersey (BA-NJ) to schools and libraries under its Access New Jersey program are not a "special regulatory subsidy," pursuant to the FCC's Fourth Order, and such rates constitute the "lowest corresponding price" (LCP) for purposes of calculating BA-NJ's reimbursement from the federal universal service fund; 2) the discounted rates offered by BA-NJ to schools and libraries under its Access New Jersey program do not preclude schools and libraries of this State from also obtaining benefits from the federal universal service fund; and 3) BA-NJ's plan to seek reimbursement from the federal universal service fund for the difference between discounted rates and tariff rates for services supplied to schools and libraries is contradictory to the FCC's ruling in its Fourth Order on Reconsideration of its Report and Order issued on universal service provisions ¹ (Fourth Order).

BA-NJ has argued that its commercially tariffed rates should be used as the LCP rather than the Access New Jersey rates applicable to all schools and libraries because the Access New Jersey rate structure is a special regulatory subsidy, and pursuant to the FCC's Fourth Order, "special regulatory subsidies need not be considered in determining the lowest corresponding price."² The Ratepayer Advocate, however, urges the FCC to rule that the Access New Jersey rates are not a

¹ Fourth Order on Reconsideration in CC Docket No. 96-45, FCC 97-420, Rel. Dec. 30, 1997)(hereinafter "Fourth Order")

² Fourth Order at ¶141.

“special regulatory subsidy,” but to the contrary, meet the definition of the LCP as delineated by the FCC as the price “no higher than the lowest price the provider charges to similarly situated non-residential customers for similar services.”³ For reasons outlined below, the Ratepayer Advocate seeks a declaratory ruling stating unequivocally that the Access New Jersey rates are the “lowest corresponding price,” pursuant to the FCC’s ruling in its Fourth Order.

We also seek a ruling that BA-NJ’s proposal that it be allowed to seek reimbursement from the federal universal service fund for the difference between its tariff rates and its discounted school and library rates offered under its Access New Jersey program is a clear contradiction of the FCC’s ruling in its Fourth Order that “the universal service discount mechanism is not funding the difference between generally available rates and special school rates. . . .”⁴

The need for an expedited ruling stems from the fact that BA-NJ has unilaterally decided that it will not provide the Access New Jersey rates to schools and libraries which seek discounts from the Federal Universal Service Fund.⁵ This decision has been the catalyst for confusion among many of the eligible schools and libraries, which BA-NJ through its policies, has forced to make the difficult and wholly unnecessary decision of choosing between the Access New Jersey discounts and the Universal Service discounts. Thus, BA-NJ has by fiat imposed its own will in this matter, rather

³ Fourth Order at ¶133.

⁴ Fourth Order at ¶141.

⁵ BA-NJ has requested action from the New Jersey Board of Public Utilities (Board) declaring that the Access New Jersey rates should not be used as the LCP (*See I/M/O the Board’s Inquiry into Bell Atlantic- New Jersey’s Progress and Compliance with Opportunity New Jersey*, BPU Docket No. TX96100707, Motion for Clarification of Order Approving ONJ Stipulation (filed August 15, 1997). However the Board has not yet issued a definitive ruling. *See also* Attachment 2, BA-NJ Access New Jersey brochure and requirements for participation.

than await a determination by the New Jersey Board of Public Utilities (Board) or the FCC on this important issue, and unilaterally denied the federal Universal Service Fund benefits to schools and libraries availing themselves of the Access New Jersey program. Considering the importance of this issue to New Jersey's schools and libraries, and recognizing the need to promptly resolve this matter so that eligible schools and libraries will not be denied benefits that both programs were intended to provide to them, the Ratepayer Advocate has filed this Petition for Expedited Declaratory Ruling and hereby asks that the FCC address this issue on an accelerated basis.

Pursuant to the FCC's ruling in its Fourth Order that the determination of a "special regulatory subsidy" must be done on a "case-by-case" basis,⁶ the Ratepayer Advocate hereby requests a definitive ruling from the FCC that the rates offered to schools and libraries under BA-NJ's Access New Jersey program are not a special regulatory subsidy, and constitute the "lowest corresponding price" for determining discounts due to schools and libraries from the federal Universal Service Fund.

⁶ Fourth Order at ¶141: "[w]e conclude that each such situation should be examined on a *case-by-case basis* to determine whether the rate is a special regulatory subsidy or is generally available to the public." (emphasis supplied).

PRELIMINARY HISTORY

The actions at issue in this petition had their genesis several years ago and stem from the initiation of a Plan for an Alternative Form of Regulation⁷ (Plan) proposed by Bell Atlantic-New Jersey (BA-NJ).⁸ BA-NJ's petition was submitted for approval to the New Jersey Board of Public Utilities (Board) in accordance with the state Telecommunications Act of 1992, *N.J.S.A. 48:2-21.16 et seq.* (NJ Act). The NJ Act, which became effective in January 1992, provided the Board with "the authority to approve alternative forms of regulation to address changes in technology and the structure of the telecommunications industry; to modify the regulation of competitive services; and to promote economic development."⁹

On March 31, 1992, BA-NJ submitted its Plan which requested a form of incentive, formula based rate cap regulation as a replacement for traditional rate base, rate of return regulation. Under the Plan, in exchange for BA-NJ's freedom from traditional rate base, rate of return regulation, BA-NJ was to provide to New Jersey ratepayers certain rate protections and a commitment to a telecommunications infrastructure improvement program. The program, known as Opportunity New Jersey (ONJ) required BA-NJ

⁷ See New Jersey Board of Public Utilities, Decision and Order, *In the Matter of the Application of New Jersey Bell Telephone Company for Approval of its Plan for an Alternative Form of Regulation*, Docket No. TO92030358, 143 PUR4th 297 (May 6, 1993).

⁸ Formerly New Jersey Bell Telephone Company.

⁹ *N.J.S.A. 48:2-21.16(a)(5)*.

“to accelerate the deployment of key network technologies to make available advanced intelligent network, narrowband digital, wideband digital, and broadband digital service capabilities in the public switched network, and thereby accelerate the transformation of [BA-NJ’s] public switched network, which today transports voiceband services (voice, facsimile and low speed data), to a public switched network, which transports video and high speed data services in addition to voiceband services.”¹⁰

Under the ONJ Plan, BA-NJ was to provide advanced transport and switching equipment through the allocation of additional investments for accelerated deployment beyond that which would have been normally spent for network improvements under a “business as usual” schedule. The ONJ plan promised to spur economic growth and provide ubiquitous availability of broadband service to all subscribers by the year 2010.¹¹

On May 6, 1993, the Board approved BA-NJ’s Plan, as modified by the inclusion of the ONJ plan in its entirety (Plan Order).¹² Additionally, the Board reserved the right to monitor the ONJ Plan and seek further accelerations of the benefits under certain conditions.¹³

At its public Agenda Meeting of October 9, 1996, the Board initiated an inquiry¹⁴ to review BA-NJ’s progress with ONJ in four areas: deployment strategies; existing benchmarks to gauge ONJ’s progress; economic development impacts; and the impact of the proposed acquisition by Bell

¹⁰ 143 PUR4th at 304.

¹¹ 143 PUR4th at 366.

¹² See New Jersey Board of Public Utilities, Decision and Order, *In the Matter of the Application of New Jersey Bell Telephone Company for Approval of its Plan for an Alternative Form of Regulation*, Docket No. TO92030358, 143 PUR4th 297 (May 6, 1993).

¹³ See 143 PUR4th at 366.

¹⁴ *I/M/O the Board’s Inquiry into BA-NJ’s Progress and Compliance with Opportunity New Jersey, Its Network Modernization Program*, Docket No. TX96100707 (October 18, 1996).

Atlantic Corporation of NYNEX Corporation¹⁵ on BA-NJ's ability to meet its ONJ obligations under the existing modified Plan.

In July 1996, the Board initiated a proceeding for the review of the proposed Bell Atlantic/NYNEX merger. By Order dated January 22, 1997, the Board combined its review of the proposed merger with the ONJ Proceedings.¹⁶ According to the Board, a combined review of the merger was appropriate considering the overlap and inextricable interrelationship of the merger issues and BA-NJ's compliance with ONJ. Thus, the Board directed that the ONJ hearings be expanded to include all merger-related issues.

Subsequent to the conclusion of hearings, Board Staff, BA-NJ and the Ratepayer Advocate, petitioner herein, engaged in settlement discussions, and ultimately reached an agreement intended to resolve all issues surrounding the review of BA-NJ's progress on its ONJ commitments. A Stipulation (ONJ Stipulation) signed by all parties was submitted for Board approval on April 18, 1997. (See Attachment 1). At its public Agenda Meeting on April 21, 1997, the Board approved the

¹⁵ By letter dated July 3, 1996, BA-NJ advised the Board of its intention to merge a new subsidiary of Bell Atlantic with and into NYNEX and filed a copy of the Amended and Restated Agreement and Plan of Merger dated as of April 21, 1996 by and between Bell Atlantic and NYNEX. Pursuant to the contemplated transaction, NYNEX would survive the merger as a wholly-owned subsidiary of Bell Atlantic. The Board initiated a separate proceeding for review of the proposed merger. *See In the Matter of the Board's Review of the Amended and Restated Agreement and Plan of Merger Dated as of April 21, 1996 by and between NYNEX Corporation and Bell Atlantic Corporation*, BPU Docket No. TM96070504.

¹⁶ *In the Matter of the Board's Review of the Amended and Restated Agreement and Plan of Merger Dated as of April 21, 1996 by and between NYNEX Corporation and Bell Atlantic Corporation*, Docket No. TM96070504 and *I/M/O the Board's Inquiry into Bell Atlantic-New Jersey, Inc.'s, Progress and Compliance with Opportunity New Jersey, its Network Modernization Program*, Docket No. TX96100707 (January 23, 1997).

Stipulation¹⁷ (ONJ Stipulation Order) which set forth several initiatives for an acceleration and redirection of BA-NJ's commitments under the original ONJ Plan, including, the additional deployment of \$50 million in new capital for an asynchronous transfer mode (ATM) fast-packet network, a \$25 million school and library equipment fund, and discounted data services to schools and libraries estimated at a total value of \$50 million over four years.¹⁸ The discount rate program, now known as Access New Jersey,¹⁹ provides discounts ranging from 31% to 72% below BA-NJ's tariffed rates to schools and libraries for the following services: integrated services digital network (ISDN), frame relay, switched multi-megabit data service (SMDS), and ATM service. (See, Attachment 1, Schedule A).

Shortly following the approval of the ONJ Stipulation, on May 8, 1997, the Federal Communications Commission (FCC) released its *Report and Order* in its docket on the Federal State Joint Board on Universal Service,²⁰ (US Order) implementing the universal service provisions of the federal Telecommunications Act of 1996,²¹ which provided for discounted telecommunications services, Internet access and inside wiring to eligible schools and libraries.

¹⁷ Order Approving Stipulation, *In the Matter of the Board's Inquiry into Bell Atlantic-New Jersey's Progress and Compliance with Opportunity New Jersey, Its Network Modernization Program*, BPU Docket No. TX96100707, 178 PUR4th 55 (June 10, 1997).

¹⁸ 178 PUR4th at 60-61.

¹⁹ Originally the program was titled "Ed-Vantage New Jersey" in the Stipulation, however, BA-NJ subsequently discovered that the service name was already in use, and changed the title to "Access New Jersey."

²⁰ Federal Communications Commission, *Report and Order*, Federal State Joint Board on Universal Service, CC Docket No. 96-45, FCC 97-157, 12 FCC Rcd 8776 (rel. May 8, 1997)

²¹ *Telecommunications Act of 1996*, 47 U.S.C. §254.

Pursuant to the US Order, telecommunications providers are required to offer schools and libraries services eligible for discounts at prices no higher than the lowest price the provider charges to similarly situated non-residential customers for similar services, i.e., the "lowest corresponding price" (LCP).²² The FCC also stated in the US Order that a provider would not be required "to match a price it offered to a customer who is receiving a special regulatory subsidy or that appeared in a contract negotiated under very different conditions, if that would force the provider to offer services at a rate below Total-Service Long-Run Incremental Cost (TSLRIC)."²³

On December 30, 1997, the FCC released its Fourth Order on Reconsideration of its US Order,²⁴ wherein, in response to a petition filed by Bell Atlantic,²⁵ the FCC reaffirmed its previous ruling in its US Order "that special regulatory subsidies need not be considered in determining the lowest corresponding price," and concluded "that each such situation should be examined on a case-by-case basis to determine whether the rate is a special regulatory subsidy or is generally available to the public."²⁶ Additionally, the FCC also noted that the universal service funding mechanism would be "applied to the *price at which the service provider agrees to provide the service to eligible schools and libraries*"(emphasis supplied) and rejected a suggestion by Bell Atlantic that the

²² US Order, ¶484.

²³ US Order at ¶489.

²⁴ Fourth Order on Reconsideration in CC Docket No. 96-45, FCC 97-420, Rel. Dec. 30, 1997)(hereinafter "Fourth Order")

²⁵ Opposition of Bell Atlantic to Petitions for Reconsideration, In the Matter of the Federal State Joint Board on Universal Service, CC Docket No. 96-45, August 18, 1997.

²⁶ Fourth Order at ¶141.

universal service funding mechanism could be used to fund the difference between generally available rates and special school rates.²⁷

The services provided by BA-NJ under its Access New Jersey program are among those services for which schools and libraries are eligible to receive discounts from the federal Universal Service Fund. In August 1997, BA-NJ filed a Motion for Clarification of the ONJ Stipulation with the Board, requesting that the Board determine that the discounted rates for services provided under BA-NJ's Access New Jersey program should not be considered the "lowest corresponding price" for purposes of determining discounts available under the federal universal service program.²⁸ However, before receiving a final determination from the Board on this issue, BA-NJ made the unilateral decision to prohibit schools and libraries that apply for funding from the federal Universal Service Fund from also receiving the benefit of the discounted prices offered under its Access New Jersey program.²⁹ BA-NJ has argued that the rates offered under its Access New Jersey program to all schools and libraries are "special regulatory subsidies" and therefore, cannot be used as the "lowest corresponding price" for determining federal Universal Service Fund discounts. Accordingly, BA-NJ has taken the position that eligible schools and libraries must choose between

²⁷ Id.

²⁸ *I/M/O the Board's Inquiry into Bell Atlantic- New Jersey's Progress and Compliance with Opportunity New Jersey*, BPU Docket No. TX96100707, Motion for Clarification of Order Approving ONJ Stipulation (filed August 15, 1997).

²⁹ See Attachment 2, BA-NJ Access New Jersey brochure and requirements for participation.

either the Access New Jersey discount *or* the Universal Service discount, but that they cannot apply for both programs.

The Ratepayer Advocate seeks a Declaratory Ruling that, contrary to BA-NJ's assertions, the FCC's Fourth Order in no way prevents the extension of Universal Service discounts in addition to the Access New Jersey discounts, nor the use of the Access New Jersey rates as the "lowest corresponding price."

ARGUMENT

- I. BA-NJ's proposal that it should be reimbursed for its Access New Jersey rates from the federal universal service fund based upon its tariff rates was already rejected by the FCC in its Fourth Order on Reconsideration.**

BA-NJ's position that it should receive reimbursement from the federal universal service fund based upon its tariff rates for services provided to schools and libraries at Access New Jersey rates completely ignores the rejection of this argument by the FCC in its Fourth Order. The FCC noted in its Fourth Order that Bell Atlantic Corporation filed comments wherein they voiced their concern that "some states may have established special universal service rates for schools and libraries in anticipation of the Commission's Order, under the assumption that the support provided in [the Telecommunications Act] would apply to the difference between generally available rates and the special school and library rates".³⁰ The FCC unequivocally rejected BA-NJ's "assumption" in its Fourth Order, when they stated that: "We also note that the universal service discount mechanism is **not** funding the difference between the generally available rates and special school rates, as **suggested by Bell Atlantic**, but is applied to **the price at which the service provider agrees to provide the service to eligible schools and libraries.**"³¹ (emphasis supplied) Thus, the "price" as defined by the FCC in the language above, is clearly the Access New Jersey rates, because these rates constitute the prices at which the services are being provided to eligible schools and libraries. However, BA-NJ ignores the FCC's ruling, arguing that they should be permitted reimbursement

³⁰ Opposition of Bell Atlantic to Petitions for Reconsideration, In the Matter of the Federal State Board on Universal Service, CC Docket No. 96-45, Federal Communications Commission (filed August 18, 1997)(See Attachment 3).

³¹ Fourth Order at ¶ 141

from the federal universal service fund for the difference between its tariff rates and the Access New Jersey rates. This is clearly evidenced by BA-NJ's argument in its February 6, 1998 letter to the Board, that "for example, where (a) the tariff price or CSP for a particular service is \$360; and (b) the Access New Jersey rate for that same service is \$180; and (c) the Federal Universal service discount available for the school and library in question is 20%, then *the Federal Universal Service Fund would pay \$72 (20% of the tariff rate or CSP)* to BA-NJ and the school or library would pay \$180 to BA-NJ."³² (emphasis supplied) Thus, the reimbursement sought by BA-NJ from the federal universal service fund is the difference between their tariff rates and the Access New Jersey rates, which has clearly been rejected by the FCC in its Fourth Order. The FCC's denial of Bell Atlantic's request clearly supports the Ratepayer Advocate's argument that the Access New Jersey rates should be considered the lowest corresponding price for purposes of the calculation of universal service discounts for eligible schools and libraries. The FCC should reaffirm its earlier decision on this issue.

II. The Access New Jersey Rates are not a "special regulatory subsidy."

BA-NJ has argued that, because the Access New Jersey rates are discounted rates, they should be deemed a "special regulatory subsidy," and pursuant to the FCC's Fourth Order, should not be used as the "lowest corresponding price" in the calculation of reimbursements for BA-NJ

³² *Letter in Lieu of Brief*, Bell Atlantic New Jersey, In the Matter of the Investigation Regarding Local Exchange Competition, Docket No. TX95120631, February 6, 1998 at 4-5. (hereinafter BA-NJ Letter)(See Attachment 4).

from the federal universal service fund.³³ Pursuant to the FCC's US Order, service providers seeking reimbursement from the Federal Universal Service Fund must offer eligible schools and libraries prices no higher than the lowest price available to similarly situated non-residential customers for similar services in the same area, i.e., the LCP.³⁴ The FCC also held that it would not require a service provider to match a price offered to a customer who is receiving a special regulatory subsidy or one that was negotiated under very different conditions, if offering the service at such a price would result in a rate below Total-Service Long-Run Incremental Cost (TSLRIC).³⁵

The Access New Jersey rates do not fall into the context of what has been traditionally deemed a "special regulatory subsidy." It is important in this regard to note that BA-NJ has never contended that the Access New Jersey rates are below cost. The Access New Jersey rates proposed for schools and libraries, though discounted, are still in excess of cost. Thus, these rates are fully compensatory to BA-NJ and the difference between the Access New Jersey rates and the underlying tariffed rates is not subsidized by any other funds. Since the rates in question are not below cost, there is no shortfall which must be "subsidized," and therefore, they do not qualify as a "special regulatory subsidy." Thus, the Access New Jersey price is the proper price ceiling which should be used to calculate the level of reimbursement available to the service provider from the federal Universal Service Fund.

³³ BA-NJ Letter at 3.

³⁴ US Order at ¶484.

³⁵ US Order at ¶489. The FCC reiterated its position that special regulatory subsidies need not be taken into account when a service provider is calculating the lowest corresponding price in the Fourth Order on Reconsideration. See ¶141.

III. The Access New Jersey rates do not qualify as a “contract negotiated under very different conditions.”

BA-NJ has argued that the Access New Jersey rates are the result of contracts “negotiated under very different conditions from typical service provider contracts,”³⁶ and therefore should not be used as the LCP pursuant to the FCC’s ruling in its Fourth Order that “for purposes of calculating the lowest corresponding price, a provider will not be required to match a price . . . that appeared in a contract negotiated under very different conditions.”³⁷ As stated previously, the Access New Jersey rates were the result of BA-NJ’s commitments under the ONJ Stipulation, which reflects the terms of a settlement entered into by BA-NJ, Board Staff and the Ratepayer Advocate, which concluded a fully litigated proceeding involving BA-NJ. The schools and libraries which are intended to be the beneficiaries of these services were not represented in the proceedings themselves nor at the negotiating table which gave rise to the Stipulation, and therefore, did not engage in any negotiations with BA-NJ for the provision of these rates. Accordingly, these rates are not akin to the situation addressed in the FCC’s ruling, such as a pre-existing contract between the school and the provider which was negotiated under different circumstances than normal. The Access New Jersey rates create a distinct class of subscribers and a unique structure for all schools and libraries which have the option of receiving service under this program; however, they are not required to take the services offered from BA-NJ under the Access New Jersey program. Thus, the Access New

³⁶ BA-NJ Letter at 4.

³⁷ Fourth Order at ¶141.

Jersey rates stand as a separate tariffed service, similar to any other tariffed service offered by BA-NJ for a given class of customers, which is generally available to all members of that class seeking service. Clearly, the issues raised in this example are far and apart from what the FCC's language regarding "contracts negotiated under very different conditions" was aimed at.

III. The federal discount from the FCC Universal Service Fund should be calculated using the Access New Jersey rates as the "lowest corresponding price," rather than BA-NJ's tariff rates.

BA-NJ has also indicated that, based upon its interpretation of ¶196 of the FCC's Fourth Order, it is permitted to seek reimbursement from the Federal Universal Service Fund for services provided to schools and libraries under its Access New Jersey program based upon its tariffed rates. The FCC ruled that "for services provided to eligible schools and libraries, Federal Universal Service discounts should be based on the price of the service to regular commercial customers or, if lower than the price of the service to regular commercial customers, the competitively bid price offered by the service provider to the school or library that is purchasing eligible services, *prior to the application of any state-provided support for schools and libraries.*"³⁸ (emphasis supplied). BA-NJ has argued that the discounted rates provided under its Access New Jersey program constitute "state-provided support," and therefore requires that federal Universal Service discounts be calculated based upon its tariffed rates, rather than the Access New Jersey rates which are actually being paid by schools and libraries. Thus for example, where the tariff price for a service is \$360 and the Access New Jersey rate being charged to schools and libraries is \$180, BA-

³⁸ Fourth Order at ¶196.

NJ argues that, if a school or library receiving the service is eligible for a 20% universal service discount, BA-NJ should be reimbursed \$72 (20% of the tariff rate) from the Universal Service Fund, rather than \$36 (20% of the Access New Jersey rate).

These propositions are simply untrue. The above quoted provision in the FCC's Fourth Order is not applicable to this matter. The discounts provided under the Access New Jersey rates to schools and libraries are not being funded by the State in any way, shape or form, and, therefore do not constitute "state support." At no time were any funds allocated or deployed by the State of New Jersey to fund the discount provided by the Access New Jersey rates. The Stipulation does not require that any funding from the State or any other outside revenue source as a pre-requisite for the provision of the discounted rates by BA-NJ.³⁹ Indeed, BA-NJ admits that "the school or library does not receive a check signed by the State of New Jersey" for the benefits of lower rates that it receives.⁴⁰ Accordingly, BA-NJ's confused construction of ¶196 of the Fourth Order is wholly without foundation and provides no justification for its actions.

- a. **BA-NJ will be allowed to breach its contractual duties under the Plan Order and the ONJ Stipulation if it is allowed to be reimbursed from the Federal Universal Service Fund based upon its tariff rates for provision of services to schools and libraries at discounted rates from the Access New Jersey programs.**

As described earlier, the Access New Jersey rates arose out of a proceeding initiated by the Board to investigate BA-NJ's progress on its commitments pursuant to the plan for alternative

³⁹ See, generally, ONJ Stipulation.

⁴⁰ BA-NJ Letter at 4-5.

regulation known as Opportunity New Jersey (ONJ). In its Order approving BA-NJ's rate cap plan, the Board specifically emphasized the fact that all ONJ commitments were to be funded solely by BA-NJ: "The funds to construct ONJ are to come from **reduced dividend payments to Bell Atlantic, retained earnings, debt issuance and new services revenues.**"⁴¹ Since the Access New Jersey rates were part of an acceleration and redeployment of BA-NJ's ONJ commitments in favor of schools and libraries, pursuant to the express wording of the Board's Order approving the Stipulation, BA-NJ is required to bear the costs of the provision of these discounts. Were BA-NJ allowed to use the universal service funding mechanism to recoup the costs of meeting its ONJ commitments, such action would clearly be in contravention to the Board's Order approving the ONJ Plan.

BA-NJ and the Board have repeatedly defined ONJ in terms of a traditional contract wherein two parties exchange promises, commitments and expectations of benefits. The Board was cognizant of this distinction when it emphasized the importance of periodically monitoring BA-NJ's commitments under the ONJ Plan:

"[I]t is, therefore, important for the Board to monitor ONJ and require [BA-NJ] to commit to achieving the entire plan, including fiber to the curb, so the projected benefits become a reality (citation omitted). Thus, in exchange for permitting [BA-NJ] to be governed by an alternative form of regulation, Staff recommends that **it is critical that the deployment scheme described in ONJ be considered a firm commitment on [BA-NJ's] part.**"⁴² (emphasis supplied)

⁴¹ 143 PUR4th at 328.

⁴² 143 PUR4th at 358.

Similarly, BA-NJ notes in its 1996 Infrastructure Deployment Report that ONJ was “designed to provide financial incentives for the Company to accelerate technology deployment by some 20 years.”⁴³ However, BA-NJ now tries to turn six years of history on its head by defining ONJ as a “regulatory subsidy” rather than a firm agreement between itself and the Board.

BA-NJ’s contractual promise to provide the discounted service to schools and libraries under the Access New Jersey program was an essential element of the Stipulation which the Board approved. The Board was clear in its approval of the Stipulation that the accelerated capital expenditures to benefit schools and libraries as set forth in the Stipulation were necessary because of the Board’s finding that BA-NJ had not expended the level of increased capital expenditures which was agreed to as one of the conditions for the Board’s approval of BA-NJ’s Plan for Alternative Regulation: “The record demonstrates that expenditures lagged expectations.”⁴⁴ In its ONJ Stipulation Order, the Board found that the requirement of the provision of these discounted rates for services to schools and libraries served a dual purpose of providing a beneficial service to this favored customer class, and that the “service discounts provided in the Stipulation is a reasonable amount which sufficiently offsets the fact that BA-NJ has been able to meet its ONJ obligations at a cost *below* the level originally anticipated.”⁴⁵ (emphasis added).

As noted previously, the Plan Order provides that the “savings” provided to schools and libraries through the Access New Jersey discounts were to be funded completely by BA-NJ, as to

⁴³ Bell Atlantic-New Jersey, 1996 Infrastructure Deployment Report at 2.

⁴⁴ 178 PUR4th at 61.

⁴⁵ 178 PUR4th at 62.

remunerate the ratepayers for BA-NJ's failure to implement the ONJ Plan at the original funding levels approved by the Board in the Plan Order. Moreover, closer scrutiny of the estimated cost of the "savings" provided by the Access New Jersey rates demonstrates the funding expended for this program is minuscule in comparison to the total revenues received by the Company. As shown by the chart in Attachment 5, which was created by BA-NJ and circulated to the Ratepayer Advocate and Board Staff during negotiation on settlement, the cost to BA-NJ of the discounts offered to schools and libraries are, by BA-NJ's own calculations, a total cost of only \$6 million per year for the first 3 years of the program, with almost half of the estimated 50% in savings not being realized until the 5th year of the program's operation. Comparing the modest cost of these "benefits" to the schools and libraries to BA-NJ's end year total revenue of \$3,537,437,000.,⁴⁶ it is abundantly clear that forcing BA-NJ to absorb these discounts will not constitute a hardship or unfair burden.

Allowing BA-NJ to receive reimbursements from the universal service mechanism based upon its tariff rates instead of the Access New Jersey rates violates BA-NJ's fulfillment of its obligations under the Board's Plan Order and the ONJ Stipulation to provide the discounted rates and the estimated \$50 million in savings to schools and libraries. Any reimbursement which BA-NJ receives from the federal universal service fund should be calculated based upon the rates at which the service is provided to schools and libraries --- the Access New Jersey rates.

⁴⁶ Federal Communications Commission Report 43-01, ARMIS Annual Summary Report, Bell Atlantic-New Jersey (1996)

CONCLUSION

The Ratepayer Advocate hereby requests that the FCC clarify that BA-NJ, in its provision of discounted services to eligible schools and libraries, must use the rates for services provided under its Access New Jersey program for purposes of calculating the "lowest corresponding price," as defined by the FCC. Contrary to BA-NJ's assertions, the Access New Jersey rates do not fall within any of the exceptions provided by the FCC's Fourth Order on Reconsideration: 1) they do not qualify as "special regulatory subsidies" or as "contracts negotiated under very different circumstances;" 2) they are not below cost; and 3) they are not "state-supported rates."

Moreover, allowing BA-NJ to receive reimbursement for its Access New Jersey rates based upon its tariff rates would constitute a breach of BA-NJ's contractual obligations under the Board's Plan Order and ONJ Stipulation, which BA-NJ entered into under its own volition. The FCC should reaffirm the decision issued in its Fourth Order, rejecting BA-NJ's proposal that universal service discounts should be applied to the difference between tariff rates and special school and library rates.

Since eligible schools and libraries of New Jersey are currently making applications for federal universal service discounts, it is imperative that the FCC resolve this matter as quickly as possible and remove the cloud created by Bell Atlantic in unilaterally imposing an "either-or" requirement on Access New Jersey rates. New Jersey schools and libraries should be entitled to the benefits offered by both programs, and the FCC should so state in unmistakable terms. In order to permit the maximum number of schools and libraries to receive the benefits of both programs, we respectfully request that the FCC act as quickly as possible.

Respectfully submitted,

BLOSSOM A. PERETZ, ESQ., RATEPAYER ADVOCATE,
NJ DIVISION OF THE RATEPAYER ADVOCATE

By: Lawanda R. Gilbert
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ATTACHMENT 1

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Anne S. Babineau
Vice President, General Counsel & Secretary

April 18, 1997

James A. Nappi, Secretary
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102

**RE: In the Matter of the Board's Inquiry into Bell Atlantic-New Jersey's Progress and
Compliance with Opportunity New Jersey
Docket No. TX96100707**

Dear Mr. Nappi:

Enclosed please find an original and ten copies of a Stipulation in the above-referenced matter.

Very truly yours,



Anne S. Babineau

ASB:dmp

cc: Service List